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**STATE OF WISCONSIN  
Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FSP/149348

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**PRELIMINARY RECITALS**

Pursuant to a petition filed May 10, 2013, under Wis. Stat. § 46.985(6)(h), and Wis. Admin. Code § DHS 65.08, to review a decision by the Washington County Department of Social Services in regard to FoodShare benefits (FS), a hearing was held on June 25, 2013, at West Bend, Wisconsin.

The issue for determination is whether Petitioner's Family Support program eligibility was correctly discontinued because she no longer meets the level of care criteria.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Mary Beth Dornan

Washington County Department of Social Services  
333 E. Washington Street  
Suite 3100  
West Bend, WI 53095

**ADMINISTRATIVE LAW JUDGE:**

David D. Fleming  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Washington County. This case has a companion case that was heard at the same time as the hearing for this case. The other case is MKB/149409 and dealt with Petitioner's Katie Beckett eligibility.

2. Petitioner has been eligible for Wisconsin Medicaid through the Katie Beckett Program since April 1, 1999. Her eligibility has been under the Nursing Home Level of Care. Petitioner is 17 years of age (3/23/96). She is diagnosed with cerebral palsy, ADD, anxiety disorder, and language disorder. Stairs, heights and crowds create panic for her. It is not disputed that she has substantial functional limitations as to bathing, grooming and eating.
3. Petitioner's Katie Beckett eligibility was subject to review in the fall of 2012. Following that review the Department's Division of Long-term Care concluded that Petitioner was no longer eligible for the Katie Beckett program because the Department concluded that she does not meet the nursing home level of care. There does not seem to be any issue as to the diagnosis or fact that Petitioner does not meet the other levels of care. The date of the discontinuance was to be June 1, 2013.
4. At or about the same time as the Katie Beckett eligibility review, Petitioner's Family Support Plan eligibility was also reviewed. It was discontinued for the same reason as the Katie Beckett.
5. There is no issue as to the relevant level of care for purposes of Petitioner's case and this decision.

### DISCUSSION

I am reversing the discontinuance of Petitioner's Family Support Program. The only reason for the discontinuance is stated in the May 20, 2013 hearing response letter (Exhibit # 2) and that letter states that Petitioner no longer meets the only relevant level of care – the nursing home level of care. In the companion case, MKB/149409, the undersigned restored Petitioner's Katie Beckett which had also been discontinued. The basis for the restoration was the conclusion that Petitioner continues to meet the Katie Beckett eligibility standards found under Standard II of the nursing home level of care, albeit a close call. The same reasoning applies here:

I also note that the agency has the burden of proof in a benefit discontinuance case. *See, e.g., State V. Hanson*, 98 Wis. 2<sup>nd</sup> 80 (Wis. App. 1980). That burden is the preponderance of the credible evidence. If the agency presents a prima facie case supporting its position the Petitioner may rebut that case.

There is no contention that Petitioner meets the hospital, psychiatric hospital or ICF-DD levels of care so it is the nursing home level of care that is at issue here. Again, she has been at the nursing home level of care.

The Manual, at Appendix 10, states the following regarding the nursing home level of care:

...

A child may be assigned this level of care if the child meets **BOTH of the criteria listed below** for Physical Disability. The criteria are:

1. The child has a **Diagnosis** of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled **Nursing Interventions and/or has Substantial Functional Limitations** requiring hands on assistance from others throughout their day.

...

*Appendix 10 of Manual at page 22 (emphasis in the original).*

The diagnosis criteria is not an issue here, rather it is the nursing intervention/substantial functional limitation criterion that is involved. There are two standards and a person must meet one or the other to qualify:

#### **2. SKILLED NURSING INTERVENTIONS AND/OR SUBSTANTIAL FUNCTIONAL LIMITATIONS**

The child must meet **ONE** of the two Standards (I-II) described below.

**STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations**

The child must demonstrate **BOTH** a need for Skilled Nursing/Therapeutic Intervention **PLUS TWO** substantial functional limitations (**A PLUS C, OR B PLUS C**):

A. Needs and receives at least **ONE** Skilled Nursing Intervention listed below that must be performed **daily** and is reasonably expected to continue *at least six months*.

OR

B. Needs and receives at least **TWO** Skilled Nursing/Therapeutic Interventions listed below that must be performed at least **weekly** (*or at the frequency noted below*) and are both reasonably expected to continue *at least six months*.

...

**STANDARD II: Substantial Functional Limitations**

The child must have substantial functional limitations requiring daily direct hands on assistance in at least **FOUR** of the seven specific areas listed below that are reasonably expected to last for *at least one year*. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

3. **Bathing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in bathing to meet a substantial functional limitation based on the child's age.

4. **Grooming or Dressing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in grooming or dressing to meet a substantial functional limitation based on the child's age.

5. **Eating:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in eating to meet a substantial functional limitation based on the child's age.

6. **Toileting:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in toileting to meet a substantial functional limitation based on the child's age.

7. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

**NOTE:** Minor to moderate global delays in several of the seven areas listed above does not meet the Substantial Functional Limitation Criterion. A significant delay in an area not listed above, such as a behavioral concern or the inability to participate in extra-curricular activities, also does not meet the required Substantial Functional Limitation.

*Appendix 10 of Manual at pages 23-26 (emphasis in the original).*

The Department appeared by letter to explain the discontinuance of Petitioner's Katie Beckett benefits. (Ex # 2). That letter provided no analysis of Petitioner's case under Standard II, indeed, it makes no mention of it at all. From the record, however, it seems that this has been the basis for her approval for most, if not all, of the time she has been Katie Beckett eligible.

Again Standard II requires that Petitioner have substantial functional limitations in 4 of the 7 listed areas. The evidence is clear that she needs assistance with bathing, grooming and eating. She does not meet the cognitive test and while she needs help with expressive communication the evidence does not indicate that she meets the receptive prong of that area. This leaves mobility and makes this case a very close call.

Petitioner does ambulate without adaptive equipment. Nonetheless, she is very anxious in any sort of crowd. In school she has to leave classes early so as to be alone in the halls, can't participate in fire drills or assemblies, etc. and has an aide assigned to her to help with that aspect of mobility. If she is expected to be in a new setting her parents must take her to the new place a head of time to familiarize her. Without these protective measures Petitioner would be in a secure setting. Again, this makes this case a very close call but without contrary argument I am concluding that Petitioner has substantial functional limitation as to mobility. I am, therefore, reversing the discontinuance of her Katie Beckett benefits.

*Division of Hearings and Appeals case # MKB-149409, issued July 31, 2013 at pages 3-5.*

Petitioner should be aware, however, that this does not assure the provision of services. As noted in the Department of Health Services online description of the Family Support Program:

Families are eligible for services if they have a child with a severe disability, under the age of 21, and living at home. A severe disability is a physical, mental, or emotional limitation which seriously restricts the child's ability to carry out basic daily living activities such as self-care, learning, communications, mobility and self-direction. Although family income is not a basis for eligibility, cost-sharing may be required on a sliding fee scale.

Family Support is a state-funded program. Because each county has limited funding for this program, eligibility does not guarantee a family will receive services. Agencies may have waiting lists for services and assessments. Families are served on a first-come, first-served basis, although priority for services may be given to families in a crisis situation or families who are bringing a child home from an out-of-home placement.

<http://www.dhs.wisconsin.gov/children/fsp/eligibility.htm>

### **CONCLUSIONS OF LAW**

That the available evidence demonstrates that Petitioner continues to meet the level of care required to continue her Family Support Plan eligibility.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency with instructions to restore Petitioner's Family Support Program eligibility. This must be done within 10 days of the date of this decision.

### **REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

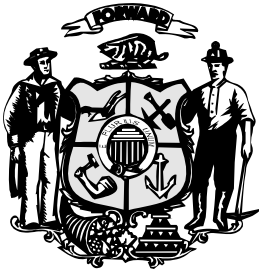
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 26th day of August, 2013

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\sDavid D. Fleming  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on August 26, 2013.

Washington County Department of Social Services  
Bureau of Long-Term Support